No. 89-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Supreme Court, U.S.
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SHEARSON LEHMAN/AMERICAN EXPRESS INC. and
RAYMOND R. CLEMENTS,

Petitioners,

v.

FRANK L. BIRD, Trustee of the FRANK L. BIRD
PROFIT SHARING TRUST, FRANK L. BIRD, Individually,
and JOAN SHEA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. The Fully Developed Conflict Among the Circuit Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate ERISA Disputes Warrants Immediate Resolution by the Court.

Petitioners have requested that the Court resolve the fully developed conflict among the circuit courts of appeals regarding the enforceability of agreements to arbitrate disputes under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA"). *See* Petition for a Writ of Certiorari ("Petition") at 5-15. The conflict among the circuits

is represented in *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989), *Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), and *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988). The conflict is mirrored by a conflict among the district courts. *See Rosenblum v. Drexel Burnham Lambert*, 700 F. Supp. 874 (E.D. La. 1987) (agreements to arbitrate ERISA claims enforceable); *see also Iacono v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989); *Cohen v. Cowen Securities, Inc.*, No. 89-8090-CIV-PAINE (S.D. Fla. July 24, 1989); *but see Gorinsky v. Bear, Stearns & Co.*, No. 89 Civ. 1224 (MBM) (S.D.N.Y. May 2, 1989) (Lexis, Fedsec library, Courts file).

Respondents, in their Brief in Opposition, conclude that a fully developed conflict regarding this issue does not exist since petitioners have cited "only two appellate level cases related to the issues currently before this Court" and "[g]iven this short and premature history it would be unwise for the Court to consider the merits of this controversy at this time." Brief in Opposition ("Opp.") at 2.[1] In addition to incorrectly stating that only two federal courts of appeals, rather than three, have decided the issue presented to the Court, respondents have failed to recognize that a conflict warranting review by the Court exists when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." *See* Rules of the Supreme Court of the United States ("Supreme Court Rules"), Rule 17.1(a).

There is thus no requirement for more than two courts of appeals to render conflicting opinions on the same issue for the Court to consider granting certiorari to resolve the conflict. The

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[1] Respondents also contest petitioners' recitation of the underlying facts of this case to the extent it "implies" that certain respondents executed the arbitration agreement binding the parties. Opp. at 1. This assertion is not relevant to the issue presented to the Court since the court of appeals ruled that respondent Frank L. Bird, who executed the arbitration agreement in his capacity as trustee, bound all participants and beneficiaries to the agreement, including non-signatories. *See Bird*, 871 F.2d at 294. Respondents have not filed a cross-petition on this issue and it is not before the Court.

Court has even granted certiorari to review circuit court opinions that refused to enforce valid arbitration agreements that did not conflict with the opinion of any other court. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

The conflict among the federal courts of appeals is fully developed. The federal courts of appeals either apply the Court's directives in *Mitsubishi* and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) to ERISA and enforce valid agreements of parties to arbitrate their ERISA disputes or they refuse to enforce such agreements without relying on any cognizable evidence of congressional intent to prohibit arbitration of ERISA. *See* Petition at 8-15.

The Second Circuit in *Bird* refused to enforce the agreement of the parties in the present case to arbitrate their ERISA dispute. The Petition asserts that the Second Circuit's opinion is premised on a judicial hostility to arbitration that the Court has categorically rejected in *Mitsubishi, McMahon* and *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). The Second Circuit in *Bird* explicitly disagreed with the Eighth Circuit's opinion in *Sulit* which adopted the rationale underlying *McMahon* and *Mitsubishi*:

> [To] the extent the *Sulit* court could "find no hint in [ERISA's] legislative history" of Congress's intent that substantive ERISA claims not be subject to compulsory arbitration, we disagree.

Bird, 871 F.2d at 298 n.8. The Second Circuit instead relied on (i) the Third Circuit's opinion in *Barrowclough* which predated *Mitsubishi, McMahon* and *Rodriguez* and (ii) aspects of ERISA that the Court has rejected as evidencing congressional intent to prohibit arbitration of any statute. *Id.* at 297. The result is a clear and direct conflict among the circuits regarding the enforceablility of agreements to arbitrate ERISA disputes.

Respondents also argue that a fully developed conflict among the federal courts of appeals does not exist since the Second and Eighth Circuits were presented with different factual settings and legal arguments. Opp. at 4. This argument of respondents is also misplaced. The Second, Third and Eighth Circuits all resolved the identical legal issue; namely, whether Congress intended to prohibit arbitration of ERISA disputes. The facts underlying these cases, moreover, had no impact on the legal issue confronting the circuits and have no relevance to the legal issue presented to the Court.

Respondents have also failed to recognize that review by the Court of the Second Circuit's opinion is also warranted since the Second Circuit "has decided a federal question in a way in conflict with applicable decisions of this Court." *See* Supreme Court Rules, Rule 17.1(c). The Court in *Mitsubishi*, *McMahon* and *Rodriguez* removed any doubt as to the enforceability of an agreement to arbitrate a statutory claim unless Congress expressed an intention to preclude arbitration of the particular statutory claim at issue. *See McMahon*, 482 U.S. at 226-27. The Court in *Rodriguez* overruled *Wilko v. Swan*, 346 U.S. 427 (1953), in an attempt to eliminate "the old judicial hostility to arbitration." *Rodriguez*, 109 S. Ct. at 1920. The Second Circuit's opinion conflicts with the Court's modern arbitration jurisprudence since it did not rely on any cognizable evidence of congressional intent to prohibit arbitration of ERISA disputes, continuing to foster a hostility to and mistrust of arbitration. This was recognized by the dissenting opinion in *Bird*:

> In the final analysis, what remains of my colleagues' underlying premise must be that Congress would not have envisioned arbitration of ERISA's remedial statutory rights because arbitrators are not up to the task. Yet, that assumption appears untenable....*See McMahon*, 107 S. Ct. at 2340; *Mitsubishi*, 473 U.S. at 633...; [*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)]....

Bird, 871 F.2d at 300 (Cardamone, J., dissenting).

The Second Circuit's opinion further conflicts with decisions of the Court by finding congressional intent to prohibit arbitration of ERISA disputes in aspects of ERISA that the Court has examined in construing the arbitrability of other statutes and rejected as evidencing such congressional intent. *See* Petition at 10-11 & n.5. The dissenting opinion in *Bird* recognized the conflict between the majority's finding of congressional intent and decisions of the Court:

> [The court's] finding of Congressional design is unsupported by [its] citations to ERISA's text or its legislative history – neither source even mentions arbitration. Further, it defies the Supreme Court's pronouncement that our "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on *statutory* rights."

Bird, 871 F.2d at 299 (Cardamone, J., dissenting) (citing *McMahon*) (emphasis in original). The Second Circuit's opinion is clearly in conflict with decisions of the Court and is reviewable under Rule 17.1(c).

Finally, respondents have failed to recognize that review by the Court is further warranted since the Second Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court...." *See* Supreme Court Rules, Rule 17.1(c). The Court has developed significant jurisprudence under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), in furtherance of the strong federal policy in favor of arbitration, requiring the rigorous enforcement of arbitration agreements. *See McMahon*, 482 U.S. at 226 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The issue presented in the Petition is as important as any of the arbitration issues the Court has reviewed in recent years. *See, e.g., Rodriguez* (arbitrability of claims asserted under § 12(2) of the Securities Act of 1933); *Volt* (validity of state statute allowing a court to stay arbitration pending resolution of related litigation); *McMahon* (arbitrability of § 10(b) of the Securities Exchange Act of 1934 and RICO); *Perry v. Thomas*, 482 U.S. 483

(1987) (enforceability of state law prohibiting agreements to arbitrate wage claims); *Mitsubishi* (arbitrability of federal antitrust laws); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (enforceability of state law prohibiting agreements to arbitrate franchise disputes); *Moses H. Cone* (propriety of staying a federal action in deference to a parallel state court action); *Scherk* (arbitrability of § 10(b) claims in international context); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (whether a federal court or an arbitrator is to resolve a claim of "fraud in the inducement" of a contract). Should the Court grant certiorari and decide the issues presented in the Petition, it can once and for all remove any further hostility to arbitration by mandating that the lower courts, including the Second Circuit, follow its directives in *Mitsubishi*, *McMahon* and *Rodriguez*.

A failure to review the Second Circuit's opinion, moreover, would conflict with the desire of Congress, which, through its enactment of the Federal Arbitration Act, allowed parties to an arbitration agreement to resolve their dispute in an expeditious manner outside of a judicial forum. This is one of the reasons the Court granted certiorari in *Keating* to review a decision that refused to enforce an arbitration agreement. *See Keating*, 465 U.S. at 7.

Respondents have failed to recognize the significance of the fully developed conflict among the federal courts of appeals and these other aspects of the Second Circuit's opinion that warrant immediate review by the Court.

II. Petitioners Have Not Sought an Advisory Opinion by Apprising the Court That This Case Presents It with the Opportunity to Clarify the Distinctions Between Its Commercial and Labor Arbitration Precedents.

The Second and Third Circuits' refusal to enforce agreements to arbitrate ERISA disputes was partially based on the Court's labor arbitration jurisprudence represented in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). *See Bird*, 871 F.2d at 297-98; *Barrowclough*, 752 F.2d at 940. The Court's labor arbitration jurisprudence is distinguishable from its commercial arbitration jurisprudence under the Federal Arbitration Act and should not have been relied on by the Second and Third Circuits. *See* Petition at 10-13. Other federal courts of appeals have also inappropriately relied on the Court's labor arbitration cases to support their refusal to enforce valid agreements of parties to arbitrate various statutory disputes. *Id.* at 16-17 & nn.8-9. Since the Second Circuit expressly relied on the Court's labor arbitration cases in refusing to enforce the parties' arbitration agreement, the Court, should it grant certiorari, will examine the applicability of these cases to the issue presented in the Petition. Petitioners have apprised the Court that should it decide to review the Second Circuit's opinion in the present case, it will have the opportunity, should it so choose, to clarify the distinctions between its commercial and labor arbitration precedents which will guide the lower courts in future cases.

Respondents have argued that this aspect of the Petition requests "an advisory opinion in violation of justiciability requirements for Article III courts." *See* Opp. at 7. Article III of the Constitution limits the judicial power of the United States Courts to "cases" and "controversies" and courts cannot issue advisory opinions which resolve issues that are not before them. *See Mistretta v. United States*, 109 S. Ct. 647 (1989); *United States v. Fruehauf*, 365 U.S. 146, 157, *reh'g denied*, 365 U.S. 875 (1961). Petitioners have not sought an advisory opinion since the applicability of the Court's labor arbitration cases to commercial

arbitration under the Federal Arbitration Act is an issue directly involved in this case. Petitioners have not asked the Court to speculate on an issue not before it, but have merely apprised the Court of the effect its resolution of this issue will have on the lower courts.[2]

[2] Respondents have also argued that the Court should not grant certiorari since Congress and various states have introduced legislation to regulate securities arbitration. Opp. at 9. The Bill respondents have referred to, H.R. Rep. No. 4960, 100th Cong., 2d Sess. (1988), was not passed by Congress and there is no similar legislation presently pending before Congress. Moreover, the state regulation respondents have relied on has recently been held to be unconstitutional. *See Securities Industry Association v. Connolly*, ____ F.2d ____, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,561 (1st Cir. Aug. 31, 1989).

CONCLUSION

Based on the foregoing reasons, as well as those contained in the Petition for a Writ of Certiorari, the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it refused to enforce the contractual agreement of the parties to arbitrate their ERISA dispute.

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